United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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77-6016

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United States Court of Appeals

For the Second Circuit

Docket No. 77-6016

BRISTOL-MYERS COMPANY,

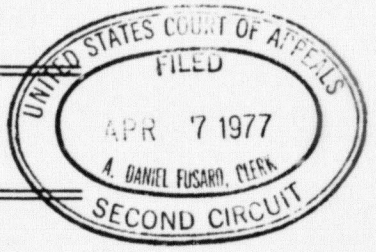
Plaintiff-Appellant,

against

FEDERAL TRADE COMMISSION, *et al,*

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

Table of Cases..... i

Statutes..... ii

As to the Delay Argument..... 3

As to Exhaustion of Administrative Remedy, and Judicial Jurisdiction..... 6

As to the Argument that Bristol is not Entitled on the Facts to the Relief it Seeks..... 9

Conclusion..... 12

TABLE OF CASES

Acevedo v. Immigration and Naturalization Service, 538 F.2d 918 (2d Cir. 1976)..... 6

In the Matter of American Home Products, et al., FTC Docket 8918..... 4

Bristol-Myers v. F.T.C., 469 F.2d 1116 (2d Cir. 1972)..... 1, 5

In the Matter of Bristol-Myers Company, et al., FTC Docket No. 8917..... 4

Corbett v. Patterson, 272 F. Supp. 602 (D. Col. 1967)..... 7

Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966)..... 2, 8, 9

International Business Machines v. Edelstein, 526 F.2d 37 (2d Cir. 1975)..... 2, 5, 8

In the Matter of Sterling Drug Inc. et al., FTC Docket No. 8919..... 4

United States v. Matlock, 491 F.2d 504 (6th Cir. 1974)..... 7

United States v. White, 454 F.2d 435 (9th Cir. 1972)..... 7

STATUTES

PAGE

Freedom of Information Act (5 U.S.C. §552)..... 12

Government in the Sunshine Act (5 U.S.C. §552b)..... 12

Administrative Procedure Act (5 U.S.C. §704)..... 8

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BRISTOL-MYERS COMPANY,

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

The contentions of defendants'-appellees' brief (FTC Br.) fall under three main categories, which this reply brief will address:

1. That Bristol pursues the within action for the purpose, or at least with the result, of delaying the commission's administrative proceeding; and that the courts should therefore discourage and defeat Bristol's effort by affirming the dismissal of its complaint, and, more, even penalize it by some suitable means. The commission repetitively flaunts Bristol-Myers v. F.T.C., 469 F.2d 1116 (2d Cir. 1972) in support.

2. That Bristol's complaint raises fact issues which should be determined by FTC in

the first instance. This argument subsumes assertions that Bristol will not have exhausted its administrative remedies until the commission has passed upon such matters, especially since, the argument goes, the ALJ has offered Bristol adequate protection of the rights it here claims have been violated (attempting to distinguish International Business Machines, and paying scant attention to Gregory); and that jurisdiction to review the matters here complained of resides exclusively in in a court of appeals while reviewing a commission final cease and desist order, if one ultimately issues.

3. That the facts show Bristol has no maintainable action against the commission, primarily because it has not fully established that commission personnel have engaged in impermissible conduct, and that Bristol offers nothing but "mere suspicion" and "unsubstantiated allegations" to that effect.

ARGUMENT IN REPLY

1. As to the Delay Argument:

The commission drags this red herring back and forth (FTC Br. 8), and back and forth (FTC Br. 9), and back and forth (FTC Br. 16), and back and forth (FTC Br. 17), and back and forth (FTC Br. 20) across the trail of sound analysis.

And red herringry it is, for if Bristol's cause is meritorious it should not be struck down just because recognizing it might cause some delay in the administrative proceeding.1/ If, on the other hand, Bristol's case is groundless, it should be rejected even though no delay of the administrative hearing would otherwise result.

Beyond that, there would be no delay had FTC timely accorded Bristol its rights to the discovery it sought (which is all it asks for here, - see appellant's brief [BM Br.] page 19, footnote 13). The entire process would probably have been over by now

Surely, an administrative agency cannot be permitted to deny a party a right to which it is entitled and

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1/ This is far from a necessary result, especially inasmuch as it now appears that Bristol-Myers' full substantive administrative hearing will not commence for about a year (infra, p. 4).

then shield its action against judicial review by maintaining that the time involved therein will delay its administrative process.2/ Time may heal wounds. but it does not make wrong into right.

In any event, despite its cries of delay, the commission has not shown that it must necessarily result from granting Bristol the discovery it seeks. Bristol has not sought a stay of the administrative proceedings, other than if this action results in a plenary determination that it is entitled to such protection. The present scheduling of the three companion administrative proceedings that are involved in connection with advertising claims for over-the-counter analgesic products 3/ contemplates a preliminary consolidated hearing from June 6, 1977 to mid-August, 1977, to be followed by a full hearing of the American Home Products proceeding. Only after that has been completed will the full hearing commence in Bristol-Myers. That, in all likelihood, cannot be before late Winter or early Spring of 1978. There is ample time for Bristol to conduct the discovery it seeks without interfering with such scheduling.

2/ Bristol has been anything but dilatory. It filed its complaint herein two weeks after the commission's final repulsion of its efforts to obtain discovery at the administrative level (BM Br. 6-7). All of Bristol's preceding steps within the commission had been taken with similar expeditiousness (BM Br. 4-6).

3/ Matters of Bristol-Myers Company, et al., FTC Docket No. 8917; American Home Products, et al., FTC Docket No. 8918; and Sterling Drug Inc. et al., FTC Docket No. 8919.

Finally, the prior decision of this Court in Bristol-Myers v. F.T.C, 469 F.2d 1116 (1972) is quite distinguishable from the present situation. One of the factors this Court took into consideration was that the pre-complaint discovery Bristol asked for would become available to it after the administrative complaint issued.4/ Here, by contrast, the type of discovery Bristol submits it is entitled to will not become timely available to it as the administrative proceeding unfolds (BM Br. 12-14).5/ Further, this Court based its determination of the 1972 appeal on a firm conviction that upon judicial review of a commission cease and desist order a court could give adequate relief to Bristol from the denial of its pre-complaint discovery.6/ Such confidence does not appear to be warranted in this case (BM Br. 14-19).

4/ "... it is by no means clear that a formal complaint will ever issue on the basis of the present investigation. It is still less certain that a cease and desist order will be entered following formal adjudication -- during which, in any event, the company will have access to the precise investigatory tools it now seeks." 469 F.2d at 1118 (underscoring added).

5/ Bristol has turned every possible stone in its effort to obtain such discovery from within the commission, and has totally exhausted its remedies at that level (BM Br. 4-6). We refer further, at pages 7-8 below, to the commission's argument and the district court's decision, that the ALJ has offered Bristol adequate protection of its rights under International Business Machines.

6/ See 469 F.2d at 1118-19.

Issues as to irreparability of injury must inevitably turn upon the specific facts of individual cases, hence be decided on an ad hoc basis. It may well be that in some cases, as cited by the commission, harm could, if need be, find adequate remedy upon appeal from final agency decision of the underlying administrative proceeding. In others, as cited by Bristol (BM Br. 22-29), it could not. Here it cannot (BM Br. 13-18).

The commission's resort to an in terrorem tactic (FTC Br. 8-9, 17) is unseemly. To strike fear into a party of coming to court to protect what it reasonably believes 7/ to be its rights by urging that penalty or recrimination be heaped upon it for doing so, now or in the future, is inconsonant with principles of justice. Parties, and prospective parties, should stand secure that such considerations will play no part in judicial determination of their causes.

2. As to Exhaustion of Administrative Remedy, and Judicial Jurisdiction:

"... the sole issue in this case is a factual determination which should be dealt with in the first instance, on the administrative level." (FTC Br. 14.) "Quite clearly, the Commission should have the opportunity to make a factual record ..." (FTC Br. 17).

7/ Cf. Acevedo, FTC Br. 8: "... we find the present petition for review to be so utterly frivolous and completely lacking in merit ..." (538 F.2d at 919), followed by a detailed demonstration of why "[t]he petition for review is totally barren of any merit whatsoever" and that "[t]he complete unsubstantiality of the petition indicates that it was not filed in good faith ..." (id. at 920).

Bristol agrees, but:

Bristol submits that in the course of making its factual record and reaching its factual determination, the commission should accord Bristol such discovery as will enable it to present the full relevant facts for the commission's consideration.8/

Bristol is not asking that the court remove from the commission's jurisdiction the making of the underlying factual determination in the first instance (i.e., whether complaint counsel impermissibly influenced their witnesses against granting ex parte interviews). It merely seeks not to be aborted in its participation in that administrative undertaking (BM Br. 19, footnote 13). The commission has had its "opportunity" to treat Bristol properly in that respect and has, by its final action, refused to do so (BM Br. 21). The only question is, therefore, whether denying immediate judicial review of that final agency action may lead to Bristol's irreparable injury. Bristol's appellate brief analyzes in detail why it must do so, including a demonstra-

8/ The essentiality for Bristol to develop in as complete and specific a manner as possible exactly what the communications were among commission personnel and the witnesses is highlighted by the very decisions cited at page 18 of the commission's brief (Matlock, White, and Corbett) where the defendants lost out only because they failed to present evidence on the record that government counsel had indeed advised witnesses not to cooperate with defense counsel. The testimony and records of the commission's people would be direct and pertinent to the issue, which is precisely why Bristol seeks their discovery.

tion that what the commission describes as adequate protection at the ALJ's hands (FTC Br. 15-16) does not preclude such injury and will not render Bristol's complaint moot (BM Br. 11-14, 18-19).

Bristol's appellate brief also sets forth in sufficient detail to require no repetition here, or embellishment, the reasons why the judicial review it now seeks is not committed exclusively to a court of appeals' review of a final commission cease and desist order (BM Br. 21-29), including, specifically, the commission's reliance upon the second sentence of 5 U.S.C. §704 (BM Br. 25-26 9/) which the commission reiterates at pages 10-11 of its appellate brief.

It is worth recalling to the Court's attention that the ALJ's argument "complaint counsel would have a right to be at any deposition of any of their witnesses being taken by Bristol-Myers, ..." (see quotation at FTC Br. 7) is, as pointed out at BM Br. 10-11 and 13-14, based upon failure to appreciate the difference between an interview and a deposition.

Certainly Gregory's teaching, which this Court found worthy of acceptance in International Business Machines (526 F.2d at 43-44), bears directly upon this case (BM Br. 11).

9/ The word "not" appears by error in the fourth line on page 26.

But the commission's brief does no more than make a single mention, in passing, of its name (footnote to page 13), with no effort to distinguish it or to show why otherwise it should not be followed here. In Gregory, the government counsel had done no more than offer witnesses his "advice that they not speak with anyone unless [he] was present" (369 F.2d at 187, 188). Yet, the court held that this mere "advice" had unlawfully "interfere[d] with the preparation of the defense by effectively denying defense counsel access to the witnesses except in his presence." (369 F.2d at 188.)

3. As to the Argument that Bristol is not Entitled on the Facts to the Relief it Seeks:

> I have consulted with Ms. Lynne C. McCoy representing the Federal Trade Commission. She has advised me that I may grant you this interview provided that one of the Federal Trade Commission's lawyers be present. May I suggest that you coordinate this interview with the aforementioned proviso in mind.

These words alone, of commission's witness Dr. Rene Menguy (164a, underscoring added), dispose of all pretension that Bristol's reasonable belief that complaint counsel have been influencing their witnesses' decisions with regard to ex parte interviews is "mere suspicion" or "unsubstantiated", or that complaint counsel have done no more in that direction than to advise their witnesses that they are entitled, if they

wish, to have their own counsel present during such interviews.10/ As pointed out at page 12 of Bristol's appellate brief, neither the ALJ nor the district court mentions the Menguy letter, which is plainly at war with the conclusions they reached. The commission's appellate brief simply proclaims, in ex cathedra tones, "Finally, Bristol-Myers' reliance on the 'Menguy letter' (164a) does not support its allegation that substantial evidence has been produced to substantiate its suspicions in this case." (FTC Br., footnote to page 14.)

Its statements at the same place 11/ tender an argument based upon the flimsy predicate that the minds of witnesses bent by complaint counsel's influence would be somehow magically restored, as tabulae rasae, to their original, uncontaminated state by telling them that the Federal Trade Commission's Administrative Law Judge had ruled that government counsel have his permission to communicate to the witnesses that, provided it is their de-

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10/ The commission's reference, at page 3 of its brief, to Bristol's counsel's statement attempts to make more of it than is warranted. As the Menguy statement makes clear, and as would other evidence Bristol has offered to supply in camera, complaint counsel have exceeded the limits of "notifying or telling the witnesses that they need not meet with us without Complaint Counsel or some other of the Federal Trade Commission representative being present."

11/ "... Bristol Myers' argument ignores the fact that complaint counsel notified the Commission's proposed witnesses of the ALJ's ruling of March 3, 1976 (147a). Any potential misapprehension on the part of the witnesses in respect to their rights, or those of Bristol-Myers was thereby cured. * * * We note that the letter from Dr. Menguy was dated

(Continued)

sire, they may have government counsel present while Bristol interviews them. If anything, such an instruction, especially if presented in a self-serving manner by complaint counsel, could be far more likely to have the reverse effect of confirming and endorsing the impression previously made upon them by complaint counsel, whose firm conviction that they had a "right" to attend the interviews suggests that their statements to witnesses would not be totally purged of intonations of self-interest.

But all of that is not the main point, which is that these matters (see also FTC Br. footnote to page 18) are issues of fact that cannot be determined adversely to Bristol on a motion to dismiss its complaint (BM Br. 8-10), nor even on a motion for summary judgment, inasmuch as they present substantial, triable issues of fact. Commission counsel's assertions, for example, (FTC Br. footnotes to pages 13 and 18) cannot, as a matter of law, be unquestioningly taken at face value. (Compare, for example, Ms. McCoy's representation, "... we have encouraged our witnesses to meet with Mr. Weil and other attorneys, and they

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(Footnote 11 Concluded)

March 5, 1976, only two days after the ALJ's initial ruling, and referred to Bristol-Myers' February 11th request for an interview. ... It also seems apparent from the date of the letter that Dr. Menguy had not yet been advised of the ALJ's March 3rd ruling (164a)."

then say, we would like you to be there, without our suggesting the point" (42a-43a) with Dr. Menguy's letter, supra, p. 9). The violation of that principle by the district court is aggravated, of course, by the undiscussed existence of the Menguy letter (supra, pages 9 and 10) and of Bristol's unaccepted offer to supply, in camera, evidence sufficient to warrant being granted discovery of the true facts to their full extent.

If those facts, once discovered, are, as the commission has so stoutly maintained them to be before the ALJ, the district court, and here on appeal, its reluctance to have them brought to light would seem puzzling in these days when Freedom of Information (5 U.S.C. §552) and Sunshine (5 U.S.C. §552b) sound major themes for the conduct of administrative agencies.

CONCLUSION

The decision of the district court should be reversed.

Dated: New York, New York
April 7, 1977

Respectfully submitted,

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Service of ~~three~~ Two copies of the within
is admitted this 7th day of April 1977

Attorney for Defendants-Appellees

2 Robert B. Fiske, Jr. (RL)
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UNITED STATES ATTORNEY